U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

MAILED: 01/02/2001

IN THE MATTER OF:	*	
	*	
Ralph J. Spero	*	
Claimant	*	
	*	
Against	*	Case No.: 2000-LHC-1936
	*	
Electric Boat Corporation	*	OWCP No.: 1-143362
Employer/Self-Insurer	*	
	*	
and	*	
	*	
Director, Office of Workers' Compensation Programs, United States Department of Labor	*	
Party-in-Interest	*	

APPEARANCES:

Timothy C. Spayne, Esq.
For the Claimant

Mark W. Oberlatz, Esq.
For the Employer/Self Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33

U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on August 8, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 1	Attorney Spayne's letter filing his status report	08/10/00
RX 11A	Attorney Oberlatz's letter filing the	08/30/00
RX 12	Claimant's master personnel records	08/30/00
RX 12A	Attorney Oberlatz's letter filing the	09/05/00
RX 13	August 24, 2000 report of William A. Wainright, M.D.	09/05/00
CX 2	Attorney Spayne's letter inquiring about the status of his fee petition filed by cover letter dated April 28, 2000 and filed with our Docket Clerk on May 1, 2000[1]	12/22/00

[1]Claimant's counsel is again reminded that this Court cannot enter a fee award until the claim has been resolved on the merits, and, in this case RX 13 was not filed until September 5, 2000.

The record was closed on December 22, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On February 2, 1998 Claimant suffered an injury in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on November 3, 1999.

7. The applicable average weekly wage is $652.08.

8. The Employer voluntarily and without an award has paid permanent partial compensation from August 21, 1999 for 134.20 weeks. (RX 3)

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Claimant's multiple medical problems are best summarized by the June 27, 1998 report of Dr. S. Pearce Browning, III, a specialist whose practice is limited to orthopedics and the hand, wherein the doctor reports as follows (RX 4 at 1-2):

Mr. Spero is 59 years old and will be 60 on July 31st. He started at Electric Boat in November of 1976. He now has 21 ½

years in, all of this is in sheet metal. He used air tools heavily his entire 21 ½ years, averaging between two to three, sometimes four hours a day.

He started to notice numbness about 1986 and also white finger. He first noticed this when he woke up one morning with a numb hand.

His general health is significant for blood pressure. At one time when he was under considerable stress, there was a question of whether he had had a stroke. His personal physician is Dr. Leach. He has had no other medication other than his blood pressure pills. He doesn't know what those are. He also takes 80 mg. of aspirin and calcium pills. He has had no problems with the heart or lungs. In the abdomen, he has an umbilical hernia. He has had no history of diabetes, thyroid disease, anemia, phlebitis; his last cholesterol was 218 a year ago. He has had no asthma or allergy.

He had an episode of Bell's palsy on the left side of his face and also numbness, or it's not complete, the sensation doesn't feel like the right. This eventually cleared. This was about 10 years ago... He was seen at Pequot and no definite diagnosis was made. This could be Lyme or it could be something else.

He has not had any injury outside of Electric Boat or other injury at E.B. of significance.

The right Allen's are mild, the left is radial mild, ulnar mild plus...

On the right hand, he has significant change. The 1st dorsal interosseous and I think also the adductor pollicis are very atrophic and the interpossei which control the ad- and abduction of the fingers is impaired. The pinwheel on the right is all right; radial and ulnar it fades at the mid palm. The 4th and 5th fingers feel numb and like wood. On the left, the pinwheel fades 1 or 2" below the wrist. The light touch is only a slight decrease. The vibration 256 seems to be all right. There is a mild decrease to 30 Hertz. The 2-point is right 7,5,9,9,8; left is 7,13,11,7,9. He also has a Tinel's sign at the left elbow. He does smoke one pack a day for 15 years.

I've started him through the evaluation process but I think that he may have some neurologic damage from other source and I will ask Dr. Alessi to look at this, according to the doctor.

Dr. Browning referred Claimant for that neurologic evaluation by Dr. Alessi by letter of June 28, 1998 (RX 4 at 3):

You will be seeing the above individual in your office on July 29, 1998 at 10:00 a.m.

A copy of my initial letter to Attorney Spayne is attached. In this gentleman, what concerns me is the atrophy and failure of function of the small muscles of the right hand. His ability to spread fingers is limited. The pinch is right 5, left 18, which indicates a very significant weakness. He has a history of Bell's palsy. He also has a history which was a little hard to obtain, but apparently there was some thought that he had had a stroke but that this did not actually become a stroke. I have requested a Lyme titer, even though he has no history of tick bite.

That neurologic evaluation took place on July 27, 1999 and Dr. Alessi sent the following letter to Dr. Browning at that time (RX 6):

It was my pleasure to see Mr. Ralph Spero in consultation today. As you know Mr. Spero is a 60-year-old right handed white male who presents with a chief complaint of bilateral hand numbness. Mr. Spero worked at Electric Boat for 22 years as a sheet metal worker. He was laid off in January 1999. While working there as a sheet metal worker he did use vibratory tools in the form of air drills and grinders and pop guns. He reports now numbness in both hands. In 1986 is when he first reported numbness and weakness in the 5th digit of the right hand, which has progressed. In the left hand he has numbness in the middle 3 digits. He does not drink any alcohol. He smokes one pack of cigarettes per day and he does have hypertension. He denies any numbness in his feet but does have what he describes as foot pain. The numbness in his hands is present at all times. It does not worsen when driving or sleeping. He does have weakness of the left side of his face from a previous Bell's palsy.

Past medical history is remarkable for hypertension. he is currently on Metoprolol and Zestorix.

Review of systems does reveal that he has severe coloration changes in his hands on exposure to cold.

GENERAL PHYSICAL EXAMINATION: Shows a well-developed, well

nourished 60-year-old white male. Blood pressure is 200/105, pulse 80. He is 5 feet 10½ inches tall, weighs 232 pounds.

NEUROLOGIC EXAM:

Mental Status: Intact.

Cranial Nerves: Intact.

Motor Exam: Shows normal muscle tone. He has very prominent wasting in the ulnar distribution of the right hand with atrophy in the FDIH and ADQ muscles. Strength is essentially normal with the exception of ulnar-innervated muscles of the right hand.

Reflexes: 1+ at the biceps, triceps and brachioradialis. He has trace patella and absent Achilles reflexes. Plantar responses are downgoing.

Sensory Testing: Show diminished pinprick and vibratory sensation distally in the hands and feet.

Based on my evaluation of Mr. Spero, it is my feeling that he is suffering from a moderately severe peripheral neuropathy. Superimposed upon this there is evidence of a severe right ulnar mononeuropathy and moderately severe left ulnar mononeuropathy both were localized to the elbow. He is scheduled to follow up in your office. I will be happy to see him back again on an as needed basis.

Dr. Browning saw Claimant in follow up on August 12, 1999 and the doctor sent the following letter to Claimant's attorney on August 21, 1999 (RX 4-4):

I saw Mr. Spero in the office on August 12, 1999, and his lab work came in after that date.

His Fasting Blood Sugar was 164. He has a slightly elevated cholesterol and LDL, which is not related to his work. His cold agglutinins are negative.

I've assigned ratings to the knees.

He was seen by Dr. Alessi, and Dr. Alessi felt he had a peripheral neuropathy and, in addition, he had severe right

ulnar nerve mononeuropathy and moderately severe left ulnar neuropathy. He does not have any lab work consistent with thyroid disease, etc., so that we are dealing with an individual who has hand-arm vibration syndrome and diabetes with accompanying diabetic neuropathy. The nerve damage is reflected in the 2-point discrimination, which is a minimum of 7 on the left and there is one 5 on the right.

I will assign a total of 25% permanent partial impairment to Mr. Spero's hands for the neuromuscular side, and 5% to the vascular side. The 25% should be split - 15% to hand-arm vibration syndrome and 10% to diabetes.

This makes a total of 30%, of which 10% is caused by the diabetes, and 20% is caused by his work.

I hope that this will allow you to resolve Mr. Spero's affairs. I have written Dr. Leach, who will also receive a copy of this letter.

Dr. Browning sent the following letter to Employer's counsel on October 25, 1999 (RX 4-5):

I have your letter of October 19, 1999 at hand.

Enclosed is a second copy of my letter of August 21, 1999 to Attorney Spayne, which deals with the problems of tool use and diabetes. It was my opinion that the permanent partial impairment of the hands was due to the combination of vibratory tool use and diabetes, and as a result of the diabetes did make his overall disability materially and substantially greater than the work injury alone. Out of the 30% total, I assigned 20% to the diabetes (see paragraph 6). The air tools (hand/arm vibration syndrome) is not the sole cause of his disability.

The Employer then referred Claimant to Dr. William Wainright, a hand surgeon, for a second opinion and the doctor sent the following letter to the Employer on December 2, 1999 (RX 5):

HISTORY: This patient is a 61 year old man who gives a work history of being employed for 23 years at Electric Boat as a sheet metal worker. He states he is right hand dominant. He was laid off from Electric Boat on January 8, 1999. His height is about five feet, ten inches. His weight is about 240 lbs. He does have a smoking history of one pack of cigarettes a day

for 45 years. He denies any thyroid disease. He denies any Lyme disease. He has a diagnosis of borderline diabetes mellitus. He has had symptoms involving both hands for two to three years. The right hand is more involved than the left. He did use air-powered, vibrating tools when employed at Electric Boat one to two hours a day. In addition, he had to pop rivets with a manual tool.

His medical records begin with a report from Dr. Pearce Browning to Attorney Timothy Spayne dated June 27, 1998. The patient stated to Dr. Browning that he had numbness starting in 1986. History of Bell's disease was given. Intrinsic muscle atrophy on the right hand was noted on exam...

Dr. Wainright concluded as follows (**Id.**):

IMPRESSION: 61 year old man with 23 year work history at Electric Boat in sheet metal mechanics. He has advanced peripheral neuropathy which has left him with marked intrinsic weakness on his right side and to a lesser extent, on his left side. Clinically, he has no findings suggestive of peripheral nerve entrapment syndrome.

The patient has reached maximum medical improvement and did so at the time of his rating by Dr. Browning on August 21, 1999. He has normal vascular testing and minimal complaints of cold sensitivity. He does have a 2% disability of each hand due to presumed vibratory white finger disease. He did complain of color changes in his digits when exposed to cold temperatures.

He does have nerve conduction studies showing an advanced peripheral neuropathy. I would agree that 25% permanent partial impairment of the hands is reasonable in this case. However, in my opinion, with the lack of physical findings showing peripheral nerve entrapment syndrome and with the marked advanced peripheral neuropathy as documented on nerve conduction studies, virtually all of his disability is due to peripheral neuropathy. I would estimate that 2% disability of each hand is die to peripheral nerve entrapment syndrome. The remaining 23% of each hand is due to his peripheral neuropathy, according to Dr. Wainright.

Dr. Wainright states as follows in his August 24, 2000 supplemental report (RX 13):

Thank you for your letter of August 11, 2000 concerning Ralph Spero. Thank you for enclosing additional medical records.

As you mentioned, Dr. Anis Racy did see the patient in consultation in June of 1996. Atrophy in the right hand was noted. This was felt to be due to possible ulnar nerve problem, or cervical root compression. His diagnosis at that time included cerebral vascular disease with moderately severe internal carotid stenosis at 70% level.

Therefore, in my opinion, this patient does have several pre-existing conditions, making his current problems materially and substantially greater. His diabetes mellitus is a strong contributor to his current problems. His advanced etho-sclerotic peripheral vascular disease is also a contributor to his current problems.

In addition, his medical records note that the fact that he is "an extremely heavy smoker". This is also a pre-existing condition making his current problems materially and substantially worse.

Claimant has undergone diagnostic tests and the results of these tests are in evidence as RX 7 (Vascular Associates) and as RX 8 (The William W. Backus Hospital). Claimant was admitted on June 19, 1996 to the ICU at Windham Community Memorial Hospital for evaluation of "an episode of transient left facial weakness associated with accelerated hypertension and positive cardiac enzymes" and Dr. Stephen J. Leach, after the usual social and employment history, his review of Claimant's medical history and his diagnostic test, gave this assessment (RX 9-3):

1. Transient left facial weakness of a central character.

2. Significant hypertension.

3. Positive cardiac enzymes in a patient with massive hypertension and several risk factors for heart disease.

Claimant was discharged on June 21, 1996 and Dr. Leach issued the following Discharge Summary (RX 9-4):

PHYSICAL EXAM: At the time of admission, showed a rather agitated, massively overweight, white male who had what appeared to be a left sided facial weakness which was of a central type

rather than a peripheral nervous type. With this, he was massively hypertensive. He also had positive cardiac enzymes. Our concern was that he was suffering from some degree of myocardial necrosis associated with massive hypertension and also possibly developing a stuttering stroke. Because of this, an emergent CT scan was obtained which showed that he had an old lacumar infarct in the parietal lobe, but there was no new infarct. Also, emergency carotid duplex studies were obtained which showed that he had a left carotid artery with internal carotid artery with stenosis of about 70%, although this was not critical.

After discussion with both neurology and cardiology, the patient was admitted to the ICU to rule out an acute MI.

HOSPITAL COURSE: 1. Cardiac status. Dr. Fisherkeller was kind enough to see him and he was impressed by the significance of his hypertension and level of his hypertension. He felt he had a hypertensive crisis with transient neurological abnormalities in a setting of uncontrolled hypertension. He felt that his cardiac enzyme elevation was somewhat equivocal. although there was no support of myocardial necrosis by history, EKG or echocardiogram. It was therefore decided that elevation of his C was not an acute MI. His recommendation was to continue with the anti-hypertensive therapy that we had him on. The initial choice of Beta Blocker was probably excellent because of the possibility of an element of coronary artery disease. Dr. Fisherkeller’s chief concern was failure of the patient to comply with treatment. Perhaps, he should have a stress SESTAMIBI when his blood pressure is adequately controlled. He also recommended to the patient that he continue to stop smoking.

2. Neurological status. Dr. Racy was extremely helpful in the management of this patient and on consultation his recommendations were very pertinent and extremely accurate. He recommended a carotid duplex study as an emergency. This was done and the patient did have a 70% stenosis, although this was considered not critical and Heparin and anticoagulation was not indicated apart from aspirin. Repeat CT scan was obtained after the patient had been in the hospital some 48 hours and this failed to demonstrate any new lesions. He also recommended that we should get a repeat doppler study in a few months and also that if the patient should develop any further neurological symptoms consideration should be given to emergency endarterectomy.

OBJECTIVE DATA: CBC was essentially negative. PT/PTT negative. Chemistry profile essentially negative and random cholesterol was 218. Cardiac enzymes were slightly elevated on admission but subsequently settled. Lyme screen negative. Fasting lipid profile was ordered, but the results are not available on the chart at this time. Carotid duplex study showed an internal carotid stenosis approximately 69-79%. There were a number of other minimal stenosis of no significance. Chest x-ray was normal.

Serial EKG's were obtained which showed nonspecific T wave abnormalities, but no other abnormalities.

DISCHARGE DIAGNOSIS:

1. Transient facial weakness of the central type suggestive of a central ischemic episode, probably related to massive hypertension.

2. Massive uncontrolled hypertension.

3. Episode of elevated CK which was probably not related to myocardial necrosis.

4. Previous history of Bell's palsy on the left...

DISCHARGE MEDICATIONS: Metoprolol 100mgs bid, Aspirin 1 qd.

As an outpatient, the patient will have a stress test obtained when his blood pressure is stable and will have a repeat carotid duplex study obtained. His follow-up will be with Dr. Leach. He has recommended a low, no added salt diet and weight reducing diet and he has recommended very strongly that he discontinue all smoking.

As noted, Dr. Anis Racy was called in in consultation and the doctor concluded as follows in his June 20, 1996 report (RX 9-7):

IMPRESSION: Left central facial weakness which was waxing and waning and which seems to have abated. This could sometimes be the preventing symptom of a Lacumar stroke with a stuttering onset. It could also be secondary to vasospasm as a protection from excessive systolic hypertension and now has resolved because B.P. is well controlled. He could also have intracranial narrowing of the middle cerebral artery which we

cannot diagnose by ultrasound. If carotid studies show narrowing on the left side which would not explain his symptoms. At this stage, I recommend repeating the CT scan and starting him on Aspirin, maintaining him on B.P. medication. He was warned about what symptoms should bring him back to medical attention, **i.e.**, if he should develop any neurological deficit or loss of vision in either eye even if it is transient. If he should have this despite being on Aspirin, then one would possibly consider endarterectomy if the symptoms are on the appropriate side, **i.e.**, if the carotid stenosis is symptomatic. Otherwise, in 6 months the doppler study should be repeated. He was given our telephone number in case he desires to call us at that time and be re-evaluated.

Dr. Mark Fisherkeller, a cardiologist, concluded as follows in his June 20, 1996 Cardiology Consultation Report (RX 9 at 9-10):

IMPRESSION:

1. Mr. Spero has hypertensive crisis with transient neurological abnormalities in a setting of uncontrolled diastolic hypertension. He has transient increase in a left facial abnormality with new and abrupt onset of dysarthria and difficulty with word finding. It is unassociated with extremities weakness. He is now with normal speech and with his baseline degree of facial asymmetry, according to his family members. His funduscopic examination disclosed evidence of chronic elevation of his systemic blood pressures. His echocardiographic assessment, remarkably, is without evidence for hypertensive heart disease.

2. Cerebrovascular disease with moderately severe internal carotid stenosis at the 70% level.

3. Equivocally elevated cardiac isoenzymes. There is no support for myocardial necrosis by clinical history, EKG or echocardiogram. I do not believe that his equivocal enzyme elevation should be considered evidence for myocardial necrosis. He is at very high risk for underlying obstructive coronary artery disease given carotid atherosclerosis, smoking history and uncontrolled hypertension, in a setting of obesity.

4. History of left Bell’s palsy in the past.

RECOMMENDATIONS: 1. Agree fully with his antihypertensive regime and beta blockade is a good initial choice in view of the probability of obstructive coronary disease as well as the earlier MEPHY trial showing reduced incidence of clinical coronary artery disease and hypertension treated with beta blockade.

2. Primary issue will be longitudinal compliance.

3. When he has his blood pressure adequately controlled, he should undergo a diagnostic exercise stress test. Given his earlier marked elevations, a nuclear perfusion image would be useful to increase the sensitivity and specificity of this examination.

4. The nonsmoking imperative has been mentioned in view of his demonstrated vascular disease as well as likelihood of coronary disease.

Claimant went to see Dr. Leach as needed for follow up and the progress notes are in evidence as RX 10. Noteworthy is the June 28, 1996 note of the doctor wherein he states that "Clearly, this is a gentleman who is significantly at risk for strokes and significant heart disease." (RX 10-1) Also, as of March 11, 1999 the doctor opined that Claimant "needs to have very close and careful supervision of his medical problems." (RX 10 at 5) Claimant has carried diagnoses of hypertension, obesity and hyperglycemia since at least June 28, 1996. (RX 10)

On the basis of the totality of this record[2], I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741

[2] As this claim has been accepted by the Employer, Claimant was excused from attending the hearing in view of his multiple medical problems and the distance to the courtroom. (TR 4-5)

(5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS

56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General**

Dynamics Corp., 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee’s condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock**

Co., 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an

injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral hand/arm vibration syndrome (HAVS), resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the

employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude that Claimant’s daily use of pneumatic tools during his maritime employment from November 23, 1976 to February 5, 1998 (RX 12) has resulted in a condition diagnosed as bilateral hand/arm vibration syndrome (HAVS), that the date of injury is February 5, 1998, that the Employer had timely notice of such occupational disease (RX 1), timely controverted his entitlement

to benefits and that Claimant timely filed for benefits once that dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463,

466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when

maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement

that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement and that he has been permanently and partially disabled from August 21, 1999, according to the well-reasoned opinion of Dr.

Browning, at which time the doctor rated Claimant's impairment due to his bilateral HAVS. (RX 4-4)

Accordingly, Claimant is entitled to an award of permanent partial disability benefits for his thirty (30%) permanent partial impairment of both hands, commencing on August 21, 1999, and such benefits, based upon his average weekly wage of $652.08, shall be computed pursuant to the provisions of Section 8(c)(1) of the Act. In so concluding, I have accepted the well-reasoned and well-documented opinions of Dr. Browning (RX 4), Dr. Wainright (RX 5, RX 13), Dr. Alessi (RX 6-RX 8) and Dr. Leach. (RX 10-RX 11) The parties have stipulated that this compensation order entitled Claimant to 134.20 weeks of benefits. (TR 7-8)

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although initially controverting Claimant’s entitlement to benefits (RX 2), nevertheless has now accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits beginning on April 14, 2000 and such benefits shall be paid for a total of 134.20 weeks, according to the Form LS-206. (RX 3)

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v.**

Berstresser, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

As noted, an employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer from November 23, 1976 to October 4, 1996 (RX 12), (1) that Claimant has suffered from essential hypertension for many years, (3) that he was admitted to the ICU on June 19, 1996 “as an emergency because of an episode of transient left facial weakness associated with transient left facial weakness associated with accelerated hypertension and positive cardiac enzymes” (RX 9-1), (4) that Dr. Stephen J. Leach, as of June 19, 1996, reported that Claimant was “massively hypertensive” (RX 9-2), and “was demonstrating significantly elevated blood pressures in the region of 240/140" (RX 9-1), (5) that Dr. Leach

also reported, at that time, that Claimant's "cardiac enzymes were elevated (and that this was) consistent with a myocardial infarction and very suggestive of a subendocardial myocardial infarction" (RX 9-1), (6) that Dr. Fisherkeller opined, as of June 20, 1996, that Claimant "is at very high risk for underlying obstructive coronary artery disease given (his) carotid atherosclerosis, smoking history and uncontrolled hypertension, in a setting of obesity," (RX 9-9), (7) that Claimant has been advised for many years to stop smoking "in view of his demonstrated vascular disease as well as likelihood of coronary disease" (RX 9-10), (8) that Claimant has carried a diagnosis of obesity for many years and he has been told to lose weight for just as many years, (as of December 2, 1999 Claimant, with a height of 70 inches, weighed 240 pounds), as well as discontinuing the two (2) packs per day of cigarettes that he was smoking since age 16 and the twelve-thirteen cups of coffee he was drinking while being treated by Dr. Leach (RX 10), (9) that Claimant has also carried a diagnosis of hyperglycemia for many years (RX 10), (11) that these medical problems have adversely affected his peripheral neuropathy, his "severe right ulnar nerve mononeuropathy and moderately severe left ulnar neuropathy" (RX 4-4), (12) that Dr. Browning has diagnosed these symptoms as due to bilateral "hand-arm vibration syndrome (HAVS) and diabetes with accompanying diabetic neuropathy" (**Id.**), (13) that Claimant's HAVS has resulted in a thirty (30%) percent impairment to each hand (RX 4-4), (14) that Dr. Browning has attributed ten (10%) percent (or 20% [RX 4-5]) of such impairment to his diabetes mellitus (**Id.**), (15) that the Employer retained Claimant as a valued employee, even with actual knowledge of his multiple medical problems, (16) that Claimant's personal problems have served as stressors of these pre-existing problems (RX 9-1, RX 9-6, RX 10-3), (17) that Claimant's permanent partial disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, the above-enumerated hyperglycemia, essential hypertension, atherosclerotic heart disease, his atrophy and failure of function of the small muscles of the right hand, his "severe right ulnar nerve mononeuropathy and moderately severe left ulnar neuropathy," as well as his "diabetes with accompanying diabetic neuropathy", and his February 5, 1998 HAVS injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Browning (RX 4) and Dr. Wainright. (RX 5, RX 12) **See Atlantic & Gulf Stevedores v.**

Director, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on February 5, 1998, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on May 1, 2000 (ALJ EX 5), concerning services rendered and costs incurred in representing Claimant between November 18, 1999 and April 5, 2000. Attorney Spayne seeks a fee of $2,150.00 based on 10.75 hours of attorney time at $200.00 per hour.

The Employer has accepted the requested attorney's fee as reasonable in view of the benefits obtained and the hourly rate charged. (ALJ EX 5, ALJ EX 6)

In accordance with established practice, I will consider only those services rendered and costs incurred after November 3, 1999, the date of the informal conference. Services rendered

prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested, fee, I find a legal fee of $2,150.00 is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on August 21, 1999, and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his thirty (30%) percent permanent partial disability of each hand, pursuant to Section 8(c)(3) of the Act, based upon his average weekly wage of $652.08, the parties have stipulated that Claimant is entitled to an award of benefits for 134.20 weeks.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his February 5, 1998 injury. The Employer shall also receive a refund, with appropriate interest, of any overpayment of compensation made to Claimant herein.

4. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was

originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, Timothy C. Spayne, the sum of $2,150.00 as a reasonable fee for representing Claimant herein after November 3, 1999 before the Office of Administrative Law Judges and between November 18, 1999 and April 5, 2000.

_____
DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl